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The Aim for Complete Uniformity in EU Private Law: An Obstacle to Further Harmonization

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Abstract: The use of maximum harmonization directives in EU private law in combination with open legal concepts is controversial. Due to differing legal cultures, it is likely that open legal concepts will be interpreted differently in the Member States. This seems to conflict with the aim of maximum harmonization as put forward by the European Commission: reducing legal fragmentation and increasing legal certainty among consumers and businesses. Although supporting the notion that national interpretations of open legal concepts are likely to differ, this article posits that this is not incompatible with the aim of maximum harmonization. It proposes a different understanding of the concept of maximum harmonization that allows for different national applications of the rules. This understanding is based on the distinction between harmonizing a legal framework (the written rules) and harmonizing the application of this legal framework. By acknowledging the importance of fully harmonizing the written rules without harmonizing the national applications of these rules, it demonstrates that maximum harmonization does not necessarily conflict with the use of open legal concepts.

Résumé: L'usage de directives visant à un maximum d'harmonisation en droit privé européen combiné avec des concepts légaux ouverts est sujet à controverses. Etant donné l'existence de cultures juridiques différentes, les concepts légaux ouverts sont susceptibles d'être interprétés différemment dans les Etats membres. Ceci semble être contraire au but de l'harmonisation maximale telle que présentée par la Commission européenne: réduire la fragmentation juridique et accroître la sûreté juridique parmi les consommateurs et les entreprises. Quoique défendant la notion selon laquelle il est probable que les interprétations nationales de concepts juridiques ouverts soient différentes, le présent article soutient que ceci n'est pas incompatible avec le but d'une harmonisation maximale. Il propose une explication différente du concept de l'harmonisation maximale qui permet des applications nationales différentes de règles. Cette interprétation est basée sur la distinction entre l'harmonisation d'un cadre juridique (les règles écrites) et l'harmonisation de l'application de ce cadre juridique. En reconnaissant l'importance d'une pleine harmonisation des règles écrites sans harmonisation des applications nationales de ces règles, il démontre que l'harmonisation maximale n'est pas nécessairement en conflit avec l'usage de concepts juridiques ouverts.

Zusammenfassung: Die Nutzung von maximalharmonisierenden Richtlinien im Europäischen Privatrecht in Verbindung mit unbestimmten Rechtsbegriffen wird kontrovers diskutiert. Aufgrund der verschiedenen Rechtskulturen ist es wahrscheinlich,

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dass unbestimmte Rechtsbegriffe in den Mitgliedstaaten unterschiedlich interpretiert werden. Dies scheint im Widerspruch mit dem Ziel der Maximal harmonisierung, wie von der Europäischen Kommission verstanden, zu stehen: Verminderung der Rechtszersplitterung und Erhöhung der Rechtssicherheit für Verbraucher und Unternehmer. Auch wenn davon ausgegangen wird, dass nationale Interpretationen unbestimmter Rechtsbegriffe wahrscheinlich voneinander variieren, vertritt der vorliegende Beitrag den Standpunkt, dass dies dennoch nicht mit dem Ziel einer Maximalharmonisierung inkompatibel ist. Der Beitrag schlägt vielmehr ein anderes Verständnis des Konzepts einer Maximalharmonisierung vor, das eine unterschiedliche nationale Anwendung der Regeln erlaubt. Dieses Verständnis basiert auf der Unterscheidung zwischen Harmonisierung eines Rechtsrahmens (die geschriebenen Regeln) und der Harmonisierung der Anwendung dieses Rechtsrahmens. Indem auf die Wichtigkeit einer Vollharmonisierung der geschriebenen Regeln ohne gleichzeitige Harmonisierung der nationalen Anwendung dieser Regeln verwiesen wird, zeigt dieser Ansatz, dass die Maximalharmonisierung nicht zwingend im Widerspruch zu der Verwendung von unbestimmten Rechtsbegriffen steht.

1. Introduction

In the last decade, the EU policy on consumer protection has shifted from minimum harmonization to maximum, or total/full, harmonization.¹ This is designated to guarantee that one uniform set of rules applies in the whole EU, thereby contributing to legal certainty for both consumers and businesses and a well-functioning internal market.² Many legal scholars have questioned the validity of the Commission's arguments in favour of maximum harmonization. In order to establish one uniform set of rules, it seems essential that a European rule is applied in more or less the same way in all Member States. To reduce variations in national interpretations, Member States need to know what the exact meaning of a rule is.³ However, maximum harmonization provisions are not always clear and specific and contain many open legal concepts that require further interpretations by national courts. Because national interpretations are likely to depend on different national

1 See, for example, the recently adopted *Directive 2011/83/EU of the European Parliament and of the Council of 25 Oct. 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* (also known as *Consumer Rights Directive (CRD)*), OJ L 304/6.

2 See, for example, Recital 7 of the *Preamble of the CRD*, n. 1; Recitals 4-5 of the *Preamble of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council* (also known as *Unfair Commercial Practices Directive (UCPD)*), OJ 2005, L 149/22.

3 Many legal scholars noted this as a condition for maximum harmonization. For example, see S. WHITTAKER, 'Unfair Contract Terms and Consumer Guarantees: The Proposal for a Directive on Consumer Rights and the Significance of Full Harmonisation', 5. *ERCL (European Review of Contract Law)* 2009-3, p. 244.

legal traditions, many scholars have argued that maximum harmonization will not be established in practice. Recently, the author of this article also argued that the open character of EU consumer directives is incompatible with the aim of maximum harmonization.⁴

The assumption that maximum harmonization and open legal concepts do not go together seems to be based on the assumption that maximum harmonization requires a uniform interpretation of a directive in all Member States. This article will discuss and counter this presumption and posit that differing national interpretations are not incompatible with the aim of maximum harmonization. A new understanding of maximum harmonization will be proposed based on a distinction between the value of harmonizing the legal framework (the written rules) and the application of this framework (the actual law).⁵ This article will underline the importance of harmonizing merely *the written rules* while allowing for divergent national interpretations. Undeniably, an understanding of maximum harmonization that focuses primarily on the (written) legal framework rather than on the application of the law raises some important and difficult questions. What is the value of maximum harmonization if it does not lead to complete uniformity in legal practices? Can Article 114 Treaty on the Functioning of the European Union (TFEU) (ex Article 95 Treaty establishing the European Community), the internal market clause, function as a legal basis for harmonization if divergent interpretations still lead to a certain degree of legal uncertainty? These questions will be answered by demonstrating the value of maximum harmonization directives, which leave considerable room for divergent national interpretations.

Section 2 will introduce the concept of maximum harmonization and the arguments that rule in its favour. Section 3 will focus on the need to use general clauses within consumer law. Section 4 will discuss criticisms of the EU harmonization process in the field of private law based on the (arguably) unbridgeable differences in the legal cultures of the Member States. In particular, it will discuss the notion that the aim for maximum harmonization conflicts with the use of general clauses and open norms.⁶ Section 5 will nuance this criticism with regard to clear-cut provisions. Section 6 will discuss the actual level of uniformity that maximum harmonization should aim for. It will argue that maximum harmonization should not be understood as aiming at a complete uniform application of the law and that to assume that it does would be at odds with the

4 A. DE VRIES, 'Maximum Harmonisation and General Clauses: Two Conflicting Concepts?', available at <<http://ssrn.com/abstract=1703078>>, 10 Jan. 2011.

5 This terminology is derived from Jan Smits' analysis of Pierre Legrand's theory; see J.M. SMITS, 'Convergence of Private Law in Europe: Towards a New *Ius Commune*', in E. Örtücü & D. Nelken (eds), *Comparative Law: A Handbook*, Hart Publishing, Oxford 2007, p. 228.

6 Sections 2, 3, and 4 will be partly based on a previous paper that I have written; see DE VRIES, 2011, n. 4.

historical development of other legal systems, at both the national and international levels. In light of this, section 7 will propose a different, more flexible understanding of maximum harmonization that provides room for different legal cultures while paving the way for greater unification in the future. Special attention will be given to the value of maximum harmonization over minimum harmonization when it does not establish complete uniformity.

The intention of this article is not to discuss the desirability of (maximum) harmonization. Although the need for maximum harmonization is controversial⁷ and much debated, that issue is not explored. The article starts from the assumption that maximum harmonization in certain areas of consumer law is needed and discusses whether or not this conflicts with (potentially) differing national interpretations.

2. Maximum Harmonization: One Uniform Regulatory Framework

To understand whether the aim of maximum harmonization conflicts with different national applications, it is useful to look more deeply into the Commission's arguments in favour of maximum harmonization. Unlike minimum harmonization, maximum harmonization does not allow Member States to maintain stricter consumer rules. The shift to maximum harmonization in the field of EU consumer law has become apparent in the Distance Marketing of Financial Services Directive (2002),⁸ the Unfair Commercial Practices Directive (UCPD) (2005),⁹ and the recently amended Consumer Credit Directive (2008).¹⁰ In addition, the EU Consumer Policy Strategy 2007–2013 identifies targeted full harmonization as the Commission's main approach.¹¹ The initial Proposal for a Directive on Consumer

7 For example: P. ROTT & E. TERRY, 'The Proposal for a Directive on Consumer Rights: No Single Set of Rules', 17. *ZEuP (Zeitschrift für Europäisches Privatrecht)* 2009-3, pp. 460–462; T. WILHELMSSON, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law', 27. *J. Consum. Policy (Journal of Consumer Policy)* 2004-3, pp. 317–337; V. MAK, 'Review of the Consumer Acquis: Towards Maximum Harmonisation?', 17. *ERPL (European Review of Private Law)* 2009-1, pp. 55–73; H.W. MICKLITZ, 'Minimum/Maximum Harmonisation and the Internal Market Clause', in G.G. Howells, H.W. Micklitz, & T. Wilhelmsson (eds), *European Fair Trading Law: The Unfair Commercial Practices Directive*, Ashgate Publishing, Hampshire 2006, p. 28; M.B.M. LOOS, 'Volledige harmonisatie van het Europese consumentenrecht: voorzichtigheid geboden!', *Tijdschrift voor Consumentenrecht* 2009-2, pp. 33–36.

8 Directive 2002/65/EC of the European Parliament and of the Council of 23 Sep. 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ 2002, L 271/16.

9 UCPD, n. 2.

10 Directive 2008/48/EC of the European Parliament and of the Council of 23 Apr. 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ 2008, L 133/66.

11 Commission Communication 'EU Consumer Policy Strategy 2007–2013: Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them', 13 Mar. 2007, COM(2007) 99 final, p. 7.

Rights (October 2008)¹² merged four existing EU directives in the field of consumer protection¹³ giving them maximum harmonization effect. Due to heavy criticism within the European Council and by stakeholders,¹⁴ the final version of the Consumer Rights Directive (CRD),¹⁵ which came into force on 25 October 2011, has been limited to merging only two directives.¹⁶

Maximum harmonization directives in the field of EU consumer law are based on Article 114 TFEU, the establishment of the internal market. Consequently, the Commission's arguments in favour of maximum harmonization are related to ensuring a well-functioning internal market.¹⁷ Maximum harmonization should ensure that one uniform set of rules applies in the whole EU, as opposed to the twenty-seven sets of different consumer protection rules currently in practice. This legal fragmentation causes uncertainty among both consumers and businesses regarding which rules apply cross-border. Businesses face substantial costs to comply with the different national laws of the Member States, and consumers' confidence in the internal market is undermined.¹⁸ The rationale of maximum harmonization is that it will reduce legal fragmentation and increase legal certainty. For example, the CRD is supposed to lift barriers within the internal market, enhance consumer confidence, and reduce compliance costs for businesses, thereby reducing reluctance to cross-border trade.¹⁹

A problem with the Commission's heavy emphasis on legal certainty is that it seems to conflict with the use of directives providing an open and general legal framework instead of specific rules. An example of such a directive is the UCPD.²⁰ If a uniform interpretation of the many open concepts in such a directive is not

12 *Commission Proposal for a directive on consumer rights*, COM(2008) 614 final.

13 *Directive 85/577/EEC on contracts negotiated away from business premises*, OJ 1985, L 372/31; *Directive 93/13/EEC on unfair terms in consumer contracts*, OJ 1993, L 95/29; *Directive 97/7/EC on distance contracts*, OJ 1997, L 144/19; *Directive 1999/44/EC on consumer sales and guarantees* (hereinafter '*Consumer Sales Directive 1999/44/EC*'), OJ 1999, L 171/12.

14 For a critical assessment of the original proposal, also see M.B.M. LOOS, 'A Critical Analysis of the Proposal for a Consumer Rights Directive', Centre for the Study of European Contract Law, University of Amsterdam, Report for BEUC – The European Consumers' Organisation 2009; J. SMITS, 'Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights', Tilburg Institute of Comparative and Transnational Law Working Paper, No. 2009/02, 2009; ROTT & TERRY, 2009, n. 7, pp. 456–488; T. WILHELMSSON, 'Full Harmonisation of Consumer Contract Law?', 16. *ZeUP* 2008-2, pp. 225–229.

15 *CRD*, n. 1.

16 Namely, *Directive 85/577/EEC on contracts negotiated away from business premises* and *Directive 97/7/EC on distance contracts*, n. 13.

17 See, for example, Recitals 6–7 of the *Preamble of the CRD*, n. 1; Recitals 4–5 of the *Preamble of UCPD*, n. 2.

18 See, among others, *Green Paper on policy options for progress towards a European Contract Law for consumers and business*, COM(2010) 348 final, p. 2.

19 Recitals 6–7 of the *Preamble of the CRD*, n. 1.

20 *UCPD*, n. 2.

guaranteed, the directive might not contribute to legal certainty.²¹ This may challenge the competence of the EU to adopt maximum harmonization directives under the internal market clause of Article 114 TFEU.²²

3. General Clauses: The Need for Flexibility

Obviously, legal certainty is not the only purpose of law. Consumer protection rules need to provide sufficient protection and a fair outcome in a whole range of different circumstances. Flexible rules are necessary in order to deal with constantly changing market practices. For example, unfair commercial practices may evolve rapidly. Presumably, some businesses will look for practices that mislead consumers without being classified as unfair under the UCPD. If rogue traders quickly find methods to avoid the new rules, this makes the directive ineffective and obsolete.²³

Flexibility can be generated by using so-called general clauses/open-ended clauses: clauses that do not determine precisely what they entail. They provide for a general rule and contain open legal concepts such as ‘good faith’. The use of general clauses is inherent in all areas of private law where huge varieties of cases can arise, such as consumer law.²⁴ In these areas, the legislator is expected to strike a balance between legal certainty and adaptability to market practices and developments. A certain degree of legal uncertainty is justified by the fact that the law must be flexible enough to function well in practice. Thus, also on national level the use of general clauses is common in the field of contract law.

The advantage of general clauses is threefold. First, they leave courts a certain margin to interpret a rule in order to react effectively to new unfair practices. A second advantage is that general clauses make it possible to take into account all the circumstances of a case, such as the knowledge of the parties, the custom in a profession, or cultural factors, thereby contributing to a fair outcome. A Third reason to use general clauses in EU law might be that the Member States cannot reach consensus on the details of a rule because national legal cultures differ too much. Open legal concepts may allow for different interpretations, thereby respecting, to a degree, the different legal cultures of the Member States.

Article 5 of the UCPD is a good example of a general clause. It introduces a general prohibition on unfair commercial practices towards consumers for all

21 This is a consequence of the Commission’s arguments in favour of maximum harmonization; see Recitals 3, 4, and 8 of the *Preamble of the UCPD*, n.2; Recitals 6-7 of the *Preamble of the CRD*, n. 1.

22 See, more extensively, DE VRIES, 2011, n. 4, p. 4.

23 H. COLLINS, *The Forthcoming EC Directive on Unfair Commercial Practices: Contract, Consumer and Competition Law Implications*, Kluwer law International, London 2004, p. 25.

24 P. ROTT, ‘What Is the Role of the ECJ in EC Private Law?: A Comment on the ECJ Judgments in *Océano Grupo*, *Freiburger Kommunalbauten*, *Leitner* and *Veefald*’, 1. *Hanse LR (Hanse Law Review)* 2005-1, p. 8.

businesses.²⁵ The criteria to assess whether a commercial practice is unfair are rather vague. For example, a commercial practice is unfair when it is contrary to the requirements of *professional diligence*²⁶ and is likely to materially distort the economic behaviour of the *average consumer*.²⁷ ‘Professional diligence’ is defined as *the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity*.²⁸ What is meant by *honest market practice*, *good faith*, or *the standard of special skill and care* is not defined. The concept of ‘the average consumer’ is rather open and highly dependent on interpretation as well.²⁹ Because these concepts will differ in different sectors, situations, and, as will be argued below, cultures, the use of an open norm is appropriate. The CRD also contains open legal concepts.³⁰ Article 5, paragraph 1, section a CRD imposes the duty on businesses to provide the consumer in *a comprehensible manner* with information on the *main characteristics* of the goods or services, to an extent *appropriate to the medium and to the goods or services*. Which information and in which manner it needs to be provided will depend on the specifics of a case.

4. Maximum Harmonization and General Clauses: Two Seemingly Conflicting Concepts

Although useful and essential, open norms and general clauses can conflict with legal certainty.³¹ Until the highest court has decided on the meaning of open legal concepts, consumers and businesses do not know their exact rights and obligations. This section will outline the main criticism on harmonization of European private law as put forward by Legrand. This criticism seems even more relevant with regard to the use of maximum harmonization in combination with open norms and general clauses. Sections 5 and 6, however, will nuance and counter this criticism.

It will always take time to clarify the meaning of new legislation. Moreover, established interpretations may need to be reconsidered and adapted over time. This

25 Recital 11 of *UCPD*.

26 Article 5, para. 2, sec. a *UCPD*.

27 Article 5, para. 2, sec. b *UCPD*.

28 Article 2, sec. h *UCPD*.

29 C.C. VAN DAM, ‘De gemiddelde Euroconsument: een pluriform fenomeen’, *SEW Tijdschrift Voor Europees en economisch recht* 2009, pp. 3–11; V. MAK, ‘Standards of Protection: In Search of the “Average Consumer” of EU Law in the Proposal for a Consumer Rights Directive’, 19. *ERPL* 2011, pp. 25–42.

30 Most of the striking examples on general clauses are removed from the revised version, such as Art. 32 on unfair terms of the original Commission proposal for a directive on consumer rights, n. 12.

31 In this regard, also see C. TWIGG-FLESNER *et al.*, *The Yearbook of Consumer Law*, Ashgate Publishing, Hampshire 2008, p. 31.

applies to rules imposed by the EU, as well as for national legislation.³² However, some scholars have noted that there is an important difference between the EU and the national level. Whereas national legal systems are supposed to derive from one legal tradition, the EU consists of various national legal cultures.³³ In addition, many aspects of national contract law remain unaffected because EU consumer law is targeted at specific areas of contract law only. As a consequence, both systems coexist and are likely to affect each other's interpretation. In its recent Green Paper on policy options for progress towards a European Contract Law, the Commission explicitly recognizes that 'also in the areas of fully harmonised provisions, there would be a need to apply them in conjunction with other national provisions of general contract law. [...] Consequently, differences between the contract laws of the Member States will remain a reality'.³⁴ The risk that courts will interpret open norms in accordance with national traditions is even higher when courts do not realize that they are dealing with EU law.³⁵

In practice, different national interpretations of EU directives have indeed occurred.³⁶ A field in which national traditions differ considerably is the field of unfair commercial practices.³⁷ Another example is the different national traditions regarding the open norm *good faith* used both in the UCPD and Directive 93/13/EEC on unfair terms in consumer contracts.³⁸ In Germany, Italy, and the Netherlands, the concept is highly developed and based on extensive case law,

32 C.U. SCHMID, 'Judicial Governance in the European Union: The ECJ as a Constitutional and a Private Law Court', in E. Oddvar Eriksen, C. Joerges, & F. Rödl (eds), *Law and Democracy in the Post-national Union*, ARENA, Oslo 2006, p. 8.

33 P. LEGRAND, 'European Legal Systems Are Not Converging', 45. *ICLQ (International and Comparative Law Quarterly)* 1996, p. 63.

34 *Green Paper on policy options for progress towards a European Contract Law for consumers and business*, n. 18, p. 5.

35 A. de Vries, n. 4, pp. 11-12.

36 In this regard, Prof. Dr Peter Rott refers to a decision of a German Court after the implementation of the *Consumer Sales Directive 1999/44/EC*. The Court explicitly referred to old pre-harmonized case law by the German *Bundesgerichtshof*. See ROTT, 2005, n. 24, p. 6. Also see G.G. HOWELLS, 'The Rise of European Consumer Law: Whither National Consumer Law?', 28. *Syd LR (Sydney Law Review)* 2006-1, p. 85; S. WHITTAKER, 'Form and Substance in the Harmonisation of Product Liability in Europe, Judgment of the European Court of Justice of 10 January 2006', 15. *ZeUP* 2007-3, pp. 858, 868; U. BERNITZ, 'Scope, Ambitions and Relation to Unfair Competition Law', in S. Weatherill & U. Bernitz (eds), *The Regulation of Unfair Commercial Practices under EU Directive 2005/29, New Rules and New Techniques*, Hart Publishing, Oxford 2007, p. 46.

37 R. SCHULTZE & H. SCHULTE-NÖLKE, *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, unpublished study undertaken on behalf of DG Sanco, European Commission, June 2003, available at <http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/unfair_practices_en.pdf>.

38 Article 2, sec. h *UCPD*, and Art. 3, para. 1 of *Directive 93/13/EEC on unfair terms in consumer contracts*.

whereas in France, the concept is rather limited. In the United Kingdom, a general doctrine on the principle of good faith does not exist at all.³⁹ In addition, the European Court of Justice (ECJ) is reluctant to clarify the concept,⁴⁰ leaving the interpretations to the national courts.

These differences in legal culture have led the Canadian Pierre Legrand to conclude that convergence of European legal systems is an illusion. In particular, he argues that the differences in legal *mentalités* between common law and civil law systems are fundamental and irreducible. Therefore, a uniform *rule* will never lead to uniform *law* in the sense that the rule is applied in a uniform way. In Legrand's view, the legal systems in Europe have not been converging, are not converging, and will not be converging.⁴¹

Although Legrand's claims may be regarded as somewhat extreme, many more scholars have argued that it is questionable whether (maximum) harmonization leads to more convergence of EU legal systems and more legal certainty.⁴² If a uniform application of the law is not guaranteed, maximum harmonization creates the false impression that one single set of rules applies in the whole EU. Instead of a uniform law, it may lead to a superficial legal certainty.⁴³ Following the Commission's own arguments in favour of maximum harmonization, this can affect the confidence of consumers and businesses in cross-border trading in a negative way.⁴⁴ Consequently, many scholars have concluded that the EU should opt for minimum harmonization directives,⁴⁵ Commission recommendations,⁴⁶ EU self-regulation and codes of conduct,⁴⁷ an

39 *Green Paper on the Review of the Consumer Acquis* - COM(2006) 744 final - *A Response by The Royal Institution of Chartered Surveyors (RICS)*, p. 10; the *Green Paper on the Review of the Consumer Acquis*, COM(2006) 744 final, p. 16.

40 European Court of Justice (ECJ), 1 Apr. 2004, Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter* (hereinafter '*Freiburger Kommunalbauten*') [2004] ECR I-3403.

41 LEGRAND, 1996, n. 33, pp. 61-64.

42 Among others: G.G. HOWELLS, *Modernising and Harmonising Consumer Contract Law*, Sellier European Law Publisher, Munich 2009, p. 308; BERNITZ, 2007, n. 36, p. 46; SMITS, 2009, n. 14, pp. 6-7; SMITS, 2007, n. 5, p. 228; ROTT & TERRY, 2009, n. 7, p. 460.

43 DE VRIES, 2011, n. 4, p. 8.

44 See, for example, Recitals 3, 4, and 8 of the *Preamble of the UCPD* and Recitals 6-7 of the *Preamble of the CRD*, n. 1. It is arguable if consumers indeed refrain from cross-border shopping when consumer law among Member States differs, like the Commission supposes. See ROTT & TERRY, 2009, n. 7, pp. 460-462; WILHELMSSON, 2004, n. 7, pp. 317-337.

45 For example, see J.M. SMITS, 'European Private Law: A Plea for a Spontaneous Legal Order', in D.M. Curtin *et al.* (eds), *European Integration and Law*, Intersentia, Antwerpen-Oxford 2006, pp. 55-107.

46 Art. 288 Treaty on the Functioning of the European Union (TFEU) (former Art. 249 TEC).

47 See, for different models of EU self-regulation in the advertising sector, European Commission, DG Health and Consumer Protection, *Self Regulation in the EU Advertising Sector: A Report of Some Discussion among Interested Parties*, July 2006.

optionalcode,⁴⁸ or other forms of soft law such as the Principles of European Contract Law (PECL) and the Common Frame of References. Recently, the Commission proposed an optional contract law instrument – the Common European Sales Law – thereby clearly recognizing the practical and political limits of maximum harmonization directives.⁴⁹ Although supporting the argument that national interpretations of EU directives are likely to differ, the next section will counter that this leads to the conclusion that the EU should refrain from maximum harmonization in the field of private law.

5. Technical and Clear-Cut Provisions: A Uniform Application Is Possible

It is important to stress that as long as certain conditions are met, maximum harmonization directives will not lead to different interpretations. The risk for divergent national legal practices highly depends on the nature of the rule. Certain technical and clear-cut provisions that provide clear and specific rules could be fully harmonized. With regard to these rules, the statement of Legrand – convergence in private law cannot be achieved because of the unbridgeable differences in legal *mentalités* between common law and civil law systems⁵⁰ – seems unfounded. Even if common lawyers and civil lawyers feel and think very differently on the right of withdrawal, a withdrawal period of seven calendar days takes as long in the United Kingdom as in France.⁵¹ Such detailed rules cannot give rise to severe interpretation problems. Therefore, it is simply not true that if (legal) cultures highly differ, a uniform law can never be established.

This example seems obvious, and one might say that it is not contradicting Legrand's theory. Legrand's main point is that legal integration of posited law will never converge the underlying legal mentality of countries. Thus, similar withdrawal rights will not lead to a similar legal mentality. This claim may very well be right; if one looks at the current national legal systems in Europe, one cannot but acknowledge that legal cultures differ considerably. However, predictions regarding (the impossibility of) future convergence of European legal systems seem difficult to make.⁵² Further, Legrand notes that culture cannot be separated from law: *If one wants to understand societies and the legal cultures they have produced [...] one must move away from rules and concepts and embrace habits and customs.*⁵³ Although

48 Commission Communication on European Contract Law and the Revision of the Acquis: *The Way Forward*, COM(2004) 651 final, OJ EC 2005, C 14/6.

49 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final. Also see *Green Paper on policy options for progress towards a European Contract Law for consumers and business*, n. 18, p. 5.

50 LEGRAND, 1996, n. 33, pp. 61–64.

51 See, for example, Art. 5 of the Directive 85/577/EEC on contracts negotiated away from business premises, n. 13.

52 SMITS, 2007, n. 5, p. 229.

53 LEGRAND, 1996, n. 33, p. 60.

undeniably plausible, with this statement, Legrand focuses on something different from the Commission. The Commission seems to be concerned with the effect of a directive. For example, a rule should establish one similar withdrawal period in the whole EU. There is no evidence that the Commission aspires to achieve instant convergence of all European legal cultures.

When it comes to legal certainty and the well functioning of the internal market, not so much the underlying legal mentality matters but the effect of a rule. Regardless of whether one agrees with such a pragmatic approach, it seems unfounded to argue that a uniform law can never be established. When it comes to clear-cut provisions, the influence of legal cultures will be very small. If one harmonizes only these rules, a uniform application can be established, even if national legal cultures are not converging.

6. A New Understanding of the Level of Uniformity under Maximum Harmonization

Although a uniform application seems possible when it comes to clear and specific rules, it is unrealistic to assume that general clauses will be interpreted similarly in all Member States. However, divergent national interpretations of a directive do not necessarily conflict with the aim for maximum harmonization. The statement that full harmonization cannot be established due to divergent national applications is, it will be argued, based on a misperception of what constitutes maximum harmonization. First, it will be discussed that the Commission's notion of maximum harmonization is highly a political statement, expressing an aspiration rather than a legal reality. Furthermore, it is posited that maximum harmonization establishes a legal framework that offers a uniform legal benchmark for all Member States but does not harmonize the content of this benchmark. The legal framework is uniform in the sense that it prescribes all relevant legal criteria. However, it is primarily up to the national courts to decide on the content of these criteria.⁵⁴

6.1. Which Level of Uniformity Does the Commission Aim For?

It is unrealistic to assume that general clauses will be interpreted similarly in all Member States. Therefore, it would be helpful if the Commission would clarify whether maximum harmonization allows for different national interpretations. Unfortunately, the Commission's view on the degree of uniformity under maximum harmonization is rather unclear, to say the least.

The Commission notices the possibility of differing interpretations of the UCPD. In its Guidance document on the implementation/application of the UCPD, it stresses: *to ensure that both consumers and traders are subject to the same rules across the EU, it is very important that national authorities and courts contribute to*

54 In this sense, but critical, see MICKLITZ, 2006, n. 7, p. 42.

*the uniform implementation and consistent enforcement of the Directive.*⁵⁵ Furthermore, in its Green Paper on European Union Consumer Protection:

To provide the required certainty and prevent differing legal interpretations by national courts, the framework directive would have to be more than simply a general principle regulating business-consumer commercial practices. It would address the main differences in national rules on commercial practices which affected the operation of the internal market, through establishing clear EU-wide rules through harmonisation.⁵⁶

However, as section 3 has shown, the meaning of general clauses tends to be far from clear. Strikingly, the objective to establish clear EU-wide rules is directly in contrast with the Commission's following remark:

The main advantage of a framework approach compared to a specific approach is that its comprehensive nature reduces the need for further detailed consumer protection regulation.⁵⁷

Moreover, in its recent Green Paper on a European Contract Law for consumers and businesses, the Commission recognizes that the risk that the *Draft Common Frame of Reference* (DCFR) and the PECL will be interpreted differently.⁵⁸ The Commission mentions as a disadvantage that there is no mechanism to ensure the uniform interpretation of the DCFR and PECL. The same would count for minimum harmonization directives.⁵⁹ With regard to the recently proposed optional Common European Sales Law, the Commission states: 'parties should have the possibility to agree that their contracts should be governed by a single uniform set of contract law rules with the same meaning and interpretation in all Member States'.⁶⁰ While not elaborating extensively on the issue of divergent interpretations, the Commission clearly acknowledges this risk since it proposes mechanisms to promote a uniform interpretation at national level. This would include a database set up by the Commission on relevant case law by national courts and the ECJ and training sessions organized by the Commission for legal practitioners using the Common

55 *Commission Staff Working Document of 3 Dec. 2009, Guidance on the implementation/application of Directive 2005/29/EC Unfair Commercial Practices*, SEC(2009) 1666, p. 6.

56 *Green Paper on European Union Consumer Protection*, COM(2001) 531 final, p. 11.

57 *Ibid.*, p. 11.

58 *Green Paper on policy options for progress towards a European Contract Law for consumers and business*, n. 18.

59 *Ibid.*, pp. 5 and 10.

60 *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM(2011) 6354 final, p. 16.

European Sales Law.⁶¹ The fact that the Commission addresses the issue of divergent interpretations with regard to most other legal instruments makes it all the more remarkable that it does not seem to recognize this risk when it comes to maximum harmonization. The Commission does mention that there would be a need to apply maximum harmonization provisions in conjunction with other national provisions of general contract law. However, it does not recognize that this may give rise to divergent national interpretations, nor does it propose mechanisms to promote a uniform application of the UCPD or the CRD.

It seems unlikely that the Commission is unaware of the tension between maximum harmonization and the use of open legal concepts. For example, it is not difficult to foresee the potential different applications of the general clauses in the UCPD. Hence, the choice for maximum harmonization seems more to reflect a political aspiration than a legal reality.⁶² Maximum harmonization needs to be understood in this context. The Commission's statements give a clear sign that Member States should strive for a uniform interpretation. In the long term, such an approach might trigger national courts to learn from each other's judgments, thereby contributing to a more uniform set of consumer rules in the EU. Depending upon one's views on how consumer law should evolve, this may justify the use of maximum harmonization, even if a complete uniform application of the rules will not be established in the near future.

The Commission's reasoning, plausible as it may seem from a political perspective, has provoked extensive criticism from legal scholars. As has already been discussed, general clauses and open legal concepts are often meant to take into account cultural differences such as language, customs, and different legal traditions. Therefore, a complete uniform interpretation will not be established as long as there are cultural differences between EU countries. By not addressing this important limitation of maximum harmonization, the Commission creates a superficial legal certainty. In the long term, this may affect the confidence of consumers and businesses in cross-border trading. Therefore, it would be better to recognize that maximum harmonization does not guarantee a uniform interpretation of the law. Admittedly, the explicit recognition that national interpretations may vary entails the risk that courts will feel free to interpret the directive solely on the basis of national legal concepts and principles. However, this could be compensated for by providing for new supervision mechanisms that

61 *Ibid.*, Art. 14 and pp. 10–11. It is arguable whether these mechanisms suffice to ensure a uniform interpretation, but it at least shows that the Commission is aware of this issue.

62 MICKLITZ, 2006, n. 7, p. 35; HOWELLS, 2006, n. 36, p. 85.

stimulate convergence in legal interpretations by national courts. Until now, that has not been sufficiently done.⁶³

The Commission has placed itself in a difficult position by stating that maximum harmonization creates legal certainty, whereas the PECL, the DCFR, and minimum harmonization may give rise to divergent interpretations. This line of reasoning does not allow for the notion that, to a certain extent, maximum harmonization suffers from the same flaws. However, convergence of legal systems requires more than labelling a directive as maximum harmonization. It seems that the Commission's notion of maximum harmonization is highly a political statement, expressing largely an aspiration rather than a legal reality. Criticism on this approach is justified, considering the legal uncertainty that it may cause. Rather than persisting in its understanding of maximum harmonization as aiming for complete convergence of laws – both in letter and in effect – the Commission should adopt a more flexible and realistic understanding of the concept.

6.2. *The Aim of Maximum Harmonization Is Not to Establish Complete Uniformity*

To interpret maximum harmonization in a way that suggests that a uniform application of European rules is to apply constitutes a too narrow interpretation of the concept. The use of general clauses and open legal concepts in maximum harmonization directives shows a clear intention to create a flexible rule. It seems unlikely that anyone expects these open concepts to be interpreted in the same way in all Member States.⁶⁴

As explained in section 3, general clauses are meant to be interpreted according to the specific circumstances of a case. At national level, the facts and circumstances of a case, such as custom and personal characteristics, influence the application of a general clause. For example, Article 7:401 of the Dutch Civil Code requires that a contractor performs in accordance with the standard of care that can be expected from a reasonably competent and reasonably acting professional in the same field.⁶⁵ In English tort law, the duty of care in a certain profession will depend on the practice accepted as proper by a responsible professional in that particular art.⁶⁶ Thus, general clauses are often applied differently to various sectors, groups, and individuals within the same country.

63 DE VRIES, 2011, n. 4, 13–16; C. TWIGG-FLESNER, “‘Time to Do the Job Properly’: The Case for a New Approach to EU Consumer Legislation”, 33. *J. Consum. Policy* 2010-4, pp. 61; N. REICH, ‘A European Contract Law, or an EU Contract Regulation for Consumers?’, 28. *J. Consum. Policy* 2005-4, pp. 383–407.

64 Similarly, Alan Watson on the interpretation of legal transplants: A. WATSON, ‘Legal Transplants and European Private Law’, *Electronic Journal of Comparative Law*, 2000-4.4, available at <www.ejcl.org/ejcl/44/44-2.html>.

65 HR (Dutch Supreme Court) 10 Jan. 2003, *NJ* 2003, 375 m.nt. MMM; *JOR* 2003, 76 m.nt. R Fennekes; *JOL* 2003, 12; *RvdW* 2003, 10.

66 The so-called Bolam test, *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582.

Likewise, general clauses in EU legislation may and should be applied differently in different countries. After all, (legal) culture can be a relevant legal factor. This is the very function of general clauses: allowing for tailor-made solutions. This means that divergent interpretations of most maximum harmonization directives in the field of EU consumer law are inherent to private law, even desirable. It will be primarily up to the Member States to decide whether open legal criteria, such as good faith, are fulfilled in a specific case. Only if a general clause is not applied or if additional national legal criteria are introduced will the maximum harmonization nature of the directive be violated.

The notion that maximum harmonization does not aspire to create uniformity in application is supported by the nature and content of the maximum harmonization directives and by the case law of the ECJ. A first indication is the use of so-called framework directives that set a general EU benchmark instead of detailed rules. For example, the general clauses in the UCPD increase consistency in the *approach* to unfair commercial practices across the Member States. This approach is uniform in the sense that the fairness of a commercial practice has to be assessed according to the criteria prescribed by the UCPD. However, it does not harmonize the content and application of the criteria.⁶⁷

Second, the *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter* (hereinafter ‘*Freiburger Kommunalbauten*’) case⁶⁸ supports that there can be different possible interpretations of a general clause. In this case, the ECJ explicitly held that it is in principle the task of the national courts to decide whether the criteria are met that render a term unfair, such as good faith. It ruled that it should not apply general criteria in EU law to a particular term, which must be considered in the light of the particular circumstances of the case, such as the national legal context.⁶⁹ The ECJ explicitly held that national law should be taken into account when assessing whether or not a term qualifies as unfair: *It should be pointed out in that respect that the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law.* It thereby recognizes that national legal culture can be a factor of importance when it comes to interpreting open legal concepts in EU law. *Freiburger Kommunalbauten* underlines that the ECJ can clarify the interpretation of EU concepts⁷⁰ but that it cannot decide on the merits of an individual case: this is left to the national courts, which are considered more competent in this regard.⁷¹ Moreover, as Advocate General Geelhoed in *Freiburger Kommunalbauten* rightly observed, legal notions of a general

67 In this sense, see MICKLITZ, 2006, n. 7, p. 42.

68 ECJ, judgment of 1 Apr. 2004, Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403.

69 ECJ, *Freiburger Kommunalbauten*, n. 68, at paras 19, 21, 22, & 25.

70 Article 267 TFEU.

71 SCHMID, 2006, n. 32, p. 93.

nature that might apply to a multiplicity of cases could give rise to continual references for preliminary rulings.⁷² While *Freiburger Kommunalbauten* deals with a minimum harmonization directive, it is to be assumed that the ECJ would follow the same approach when it comes to maximum harmonization directives. Only if the facts of a case are so evident that only one right interpretation can be made will the ECJ decide on the application of a general clause itself.⁷³

Another indication that cultural factors may play a role in the interpretation of EU concepts can be found in the case law of the ECJ with respect to the term ‘consumer’. The ECJ held that social, cultural, and linguistic factors should be taken into account when interpreting this term.⁷⁴ The same notion of the term ‘consumer’ can also be found in the UCPD.⁷⁵ At least with regard to this term, it shows that both the ECJ and the European legislator explicitly allow social, cultural and linguistic factors to influence the interpretation of EU consumer law.

6.3. *European Systems Should Develop Organically*

To expect that maximum harmonization would immediately lead to complete uniformity in the application of EU law would be at odds with the development of other national and international legal systems. As Jan Smits observes, the development of national private law systems has been a long process of trial and error.⁷⁶ Private law systems develop organically towards a standard that a community prefers. In line with this argument, open concepts in EU law, which allow for divergent and changing preferences, are preferable over strict and specific rules. Of course one could argue, as Smits does,⁷⁷ that minimum harmonization allows for even more bottom-up legal development. However, once the need for further harmonization in a particular field is assumed, opting for a framework directive seems to be a suitable way of striving for more uniformity while still leaving reasonable room for spontaneous legal development.

All laws, national and international, can give rise to divergent case law. Even Legrand recognizes that regional legal cultures within one country may differ.⁷⁸ As Alan Watson puts it, *pain* in French means something different for a wealthy Parisian than for a poor village housewife. On the other hand, a small Belgian farmer

72 Advocate General Geelhoed, Opinion in Case C-237/02 *Freiburger Kommunalbauten*, 25 Sep. 2003, para. 17.

73 ECJ, judgment of 27 Jun. 2000, Joined Cases C-240/98 and C-244/98 *Océano Grupo Editorial SA v. Rocío Murciano Quintero and Salvat Editores SA v. José M. Sánchez Alcón Prades and Others* [2000] ECR I-4941, paras 22–24.

74 ECJ, 16 Sep. 1999, Case C-220/98 *Estée Lauder v. Lancaster* [2000] ECR I-117, para. 29.

75 Recital 18 UCPD.

76 J.M. SMITS, ‘Democracy and (European) Private Law: A Functional Approach’, in M. Faure & A. van der Walt (eds), *Globalization and Private Law*, Edward Elgar, Cheltenham 2010, p. 39.

77 SMITS, 2006, n. 45, pp. 55–107.

78 LEGRAND, 1996, n. 33, p. 63.

would have legal perceptions that are closer to those of a small farmer in a neighbouring country than to those of a businessman from Brussels.⁷⁹ As discussed, national private law systems take into account these differences. It is therefore an illusion that there is complete uniformity within one country. In addition, it seems very unlikely that new national rules are immediately interpreted in the same way by all national courts. Even after a long time, there may still be unexpected developments in case law. For example, the Dutch Supreme Court ruled in 1982 that the duty of good faith can include pre-contractual liability.⁸⁰ This interpretation was not obvious and foreseeable, given that the Dutch Civil Code does not contain a provision on pre-contractual liability. Thus, it is inconsistent to argue that complete uniformity is a necessity when it comes to the application of EU law. It is only a logical consequence of upscaling a legal territory that the interpretation differences on the EU scale are bigger than on the national scale.

In fact, to require that EU maximum harmonization directives should be interpreted uniformly is to apply a double standard. Whereas not many would deny that national law should be flexible in order to develop organically and to provide tailor-made solutions, it is often argued that EU law should either lead to instant uniformity or not aim at maximum harmonization at all. If the same line of reasoning were applied to national legal systems, this would seriously hinder the national legislative process as well. Admittedly, it would probably take (considerably) more time to come to a uniform understanding of EU legal concepts than it would require national courts to align their case law. However, maximum harmonization could be a first step in this direction.⁸¹

7. The Value of Maximum Harmonization if It Does Not Aim at Complete Uniformity

If harmonization is understood as converging only the legal framework and not the content of the rules, what then is the value of maximum harmonization over minimum harmonization? After all, to establish legal certainty, a uniform application of the law seems essential.

This is a legitimate question that is not easy to answer. It is difficult to predict the development of European legal systems. It seems plausible that the differences in legal cultures will stand in the way of a uniform application of open legal concepts in the near future, and it would be advisable if the Commission addressed this issue so that consumers and businesses could prepare for potential divergent interpretations of the law. However, the lack of immediate uniformity does not mean that maximum harmonization has no value over minimum harmonization; unlike minimum

79 WATSON, 2000, n. 64.

80 See the judgment by the Dutch Supreme Court in the case *Plas v. Valburg*, HR 18 Jun. 1982, *NJ (Nederlandse Jurisprudentie)* 1983, p. 723.

81 As will be shown in sec. 7.

harmonization, maximum harmonization guarantees that the same legal criteria apply in all Member States. This does not mean that the outcome of the law will always be similar, but at least courts must follow the same procedure and assess the same legal criteria in all cases. The legal development of national private law shows that systems tend to learn from one another. As Watson shows, lawyers have always taken an extreme interest in juristic opinions and decisions in other countries.⁸² Although complete convergence of interpretation seems far away, legal scholars might speed up the process by studying judicial decisions in other countries. The very fact that the written rule is the same may trigger legal comparison and cause legal thinking in different countries to converge.⁸³ Moreover, it may cause courts to learn from each other. For example, while English law does not recognize a general doctrine on good faith as such, the concept nevertheless needs to be applied when a court is asked to decide on the fairness of a commercial practice under the UCPD. In doing so, the UK courts may draw inspiration from other legal systems. That courts can learn from foreign decisions is illustrated by the House of Lords, which has referred to the 'Ius Commune Casebook on Tort Law'.⁸⁴

Although the EU harmonization process is slow and complete uniformity is still a long way off, maximum harmonization framework directives seem a step further along the road. Unifying legal rules might be a trigger for mutual learning and stimulate scholars to engage in extensive mapping of differences in national case law. The Commission could contribute to this process by creating a platform for exchanging and monitoring relevant case law and organizing training sessions for legal scholars, as it intends to do with the recently proposed optional Common European Sales Law.⁸⁵ Meanwhile, consumers and businesses need to be aware of potential differences in national applications of vague legal concepts. The value of maximum harmonization is that it does not allow for additional national criteria to be applied. Consequently, parties at least know exactly on which (vague) legal concepts they need to do additional research. If the Commission and legal scholars carry out this research and make it available to the public, this could eliminate most legal uncertainty and significantly reduce transaction costs.

To summarize, maximum harmonization should be regarded as a means that could trigger further integration of legal thinking and cross-border learning by courts and legal scholars. It should not be regarded as the end result of the EU legislative process. Rather than requiring an instant convergence of legal cultures

82 WATSON, 2000, n. 64.

83 *Ibid.*

84 SMITS, 2007, n. 5, p. 231.

85 See pp. 10-11 and Art. 14 of the *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM(2011) 635 final. It is arguable whether these mechanisms suffice to ensure a uniform interpretation; considering the cultural and legal differences, this seems unlikely.

and a complete uniform application of the law, maximum harmonization is an instrument that may bring the EU one step closer to uniformity.

8. Conclusion

This paper argues that maximum harmonization does not conflict with the use of general clauses. Although different national interpretations are likely to occur, this is the very nature of framework directives. Different interpretations allow for tailor-made and flexible outcomes that take into account all relevant factors. Legal tradition may just as much be a relevant factor as culture, customs, and the person of the parties. Thus, contrary to the Commission's apparent assumption, maximum harmonization framework directives will not lead to complete uniformity in the near future. Instead of creating an unjustified expectation of legal certainty, it would be preferable if the Commission were to address these divergences and embrace them. Maximum harmonization should be understood as harmonizing the legal rules without harmonizing the content of these rules. This can be a first step towards convergence of legal thinking. Applying a similar legal framework, with similar legal concepts, criteria and, structures, may bring the benefit of triggering legal comparison and mutual learning by national courts and scholars. To speed up this process, it is advisable that the Commission maps and publishes the main differences in national applications.

No one can predict the success of the EU harmonization process. However, sticking to minimum harmonization because national cultures differ heavily is a self-fulfilling prophesy. Fully harmonizing the legal framework seems a plausible first step to pave the way for an actual uniform application of the rules and a convergence in legal thinking.